No. 88-6613

(10)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD BOYDE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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Questions Presented

1. Was the jury in this case, given the totality of instructions, argument and evidence, adequately informed that it could consider all of the mitigating evidence?

2. Should this Court construe the Eighth Amendment to forbid any channeling of the sentencer's discretion to grant a life sentence at the final stage of capital sentencing, overruling *Jurek* v. *Texas*, 428 U. S. 262 (1976)?

This brief *amicus curiae* will address only question 2.

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society.

Defendant in this case seeks a declaration that the people of a state are constitutionally powerless to specify, in general terms and with due regard for any mitigating circumstances, the type of offense and offender for which a death sentence is appropriate. Instead, he claims, the jurors must have unlimited discretion to vote for a life sentence based only on their personal notions.

Such a haphazard system would deny society due process of law and deny victims the equal protection of the laws. It would be contrary to the purpose for which CJLF was founded. CJLF therefore has a substantial interest in this case.

SUMMARY OF FACTS AND CASE

Defendant petitioner Richard Boyde is a habitual criminal. Witnesses at trial testified to *eight* robberies of convenience stores, a doughnut shop, and a gas station committed by Boyde over a five-year period. *People* v. *Boyde*, 46 Cal.3d 212, 222, 242, 247, 758 P. 2d 25 (1988). In three of these robberies Boyde kidnapped the victim. *Id.*, at 222, 228, 242. In the last robbery, Boyde killed Dickie Gibson by shooting him twice in the head, once at close range, in order to prevent Gibson from identifying him. *Id.*, at 222-23, 228-29, 231.

The jury sentenced Boyde to death, and the Supreme Court of California affirmed. Among the contentions rejected by that court were that the instruction to consider "any other circumstance which extenuates the gravity of the crime" did not permit the jury to consider Boyde's unhappy childhood, etc., *id.*, at 250-51, and that the instruction on weighing aggravating and mitigating circumstances did not properly inform the jury of the scope of its discretion, *id.*, at 252-255. The court divided 4-3 on the second point. See *id.*, at 257 (Arguelles, J., dissenting).

SUMMARY OF ARGUMENT

Defendant's first argument was not accepted by any of the Justices of the California Supreme Court and is fully refuted by the brief of the Attorney General. This brief amicus curiae will therefore be limited to the second question.

The question of whether a state can preclude the sentencer's reception or consideration of mitigating evidence is a separate question from whether the state can channel the sentencer's consideration of that evidence. Nothing in this Court's precedents precludes such

guidance, several cases uphold it, and there is a substantial body of opinion that channeling is constitutionally *required*.

While a state cannot decide in advance that as a matter of state policy a particular aggravating circumstance necessarily outweighs any and all mitigating circumstances, a state can and should state its policy as to which aggravating circumstances warrant a death sentence in the absence of mitigating circumstances.

While the sentencing determination should be individualized to the defendant, it is neither necessary nor desirable to allow one jury to sentence according to standards that differ from those used by another jury. Therefore, this Court should encourage, not prohibit, the establishment of uniform standards for capital sentencing.

There is substantial reason to believe that the rule defendant seeks would exacerbate the problem of biased sentencing based on the race of the victim. This Court should not preclude a structuring of sentencing discretion which may prove useful in combating racial discrimination.

ARGUMENT

I. Consideration of all mitigating evidence does not require unlimited discretion in applying that evidence.

A. The Decline of Standardless Discretion (Scylla).

The defense argument in this case "turns the law on its head to conclude, apparently, that *because* a decision to take someone's life is of such tremendous import, those who make such decisions [must] not be 'inhibit[ed]' by the safeguards otherwise required by due process of law." *McGautha* v. *California*, 402 U. S. 183, 309 (1971) (Brennan, J., dissenting). In so arguing, the defense seeks to take capital punishment virtually back to the starting point: where it was at the time of *McGautha*.

In *McGautha*, this Court upheld the prior California law of standardless discretion against a Fourteenth Amendment challenge. There were three dissenting votes.

> "California fails to provide any means whereby the fundamental questions of state policy with regard to capital sentencing may be authoritatively resolved. They have not been resolved by the state legislature, which has committed the matter entirely to whatever[] judge or jury may exercise sentencing authority in any particular case." *Id.*, at 305 (dissent).

The approach of the *McGautha* dissent was accepted for all practical purposes in *Furman* v. *Georgia*, 408 U. S. 238 (1972). In *Furman*, the "position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976),[1] "focus[sed] on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted." *Id.*, at 179.

To avoid the "imprisonment" of the *McGautha* holding, *Furman*, 408 U. S., at 248 (opinion of Douglas, J.), Justices Douglas, Stewart and White pounded the square pegs of equal protection and due process into the round hole of the Eighth Amendment. Never before had the question of whether a punishment was cruel or unusual for a given crime depended upon the *procedure* by which it was imposed. Justice Douglas was the most explicit about the equal protection basis of his opinion. *Id.*, at 249, 256-57.[2] Justice Stewart's opinion was based on the belief that the penalty as then administered was "cruel and unusual in the same way that being struck by lightning is cruel and unusual," and that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.*, at 309-310. Justice White's opinion was

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1. Citations to *Gregg* and its companion cases are to the joint opinions of Justices Stewart, Powell and Stevens unless otherwise noted.

2. He also noted the "tension" between *Furman* and *McGautha*, *id.*, at 248-49, n. 11, an understatement.

based on the lack of a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313.

These opinions represent much more than mere "tension" with *McGautha*. The holding of the *Furman* court pieced together from these opinions is a *sub silento* overruling of *McGautha* and an adoption of the dissent in that case. The nominal placement of the *Furman* rule under the Eighth Amendment instead of the Fourteenth makes no difference. Whether the constitutional value protected is due process, equal protection or freedom from cruel and unusual punishment the principle is the same: similarly culpable criminals should receive similar punishments, and unguided discretion fails to meet the requirement.

Whichever clause is invoked, the problem is *not* to mandate the procedure which will produce the minimum number of death sentences. See *McGautha*, 402 U. S., at 305 (Brennan, J., dissenting). The problem is to "make certain that no State takes one man's life for reasons that it would not apply to another." *Id.*, at 306.

B. The Disapproval of Mandatory Sentencing (Charybdis).

In response to *Furman's* concern for uniformity in sentencing, mandatory sentencing laws were enacted by ten states, see *Woodson* v. *North Carolina*, 428 U. S. 280, 313 (1976) (Rehnquist, J., dissenting). However, the *Woodson* court found three deficiencies in this approach, and it is this case that is the genesis of defendant's attack on the California statute.

The first reason for *Woodson* was the general rejection by society, prior to *Furman*, of mandatory sentences. 428 U. S., at 288, 301. That consensus is clearly inapplicable to the much more limited post-*Furman* question of whether a death penalty can be required upon specific penalty-phase findings which consider all mitigating circumstances.

The second deficiency of the statute in *Woodson* was that the vast sweep of the mandatory death penalty in that statute made widespread jury nullification inevitable. When the jury is deprived of any legitimate means of expressing its strong view that a particular defendant not be put to death, some juries will disobey their instructions and some will obey them. The resulting random pattern of sentences "does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with *objective standards to guide, regularize, and make rationally reviewable* the process for imposing a sentence of death." *Id.*, at 303 (italics added).

The third constitutional shortcoming found by the *Woodson* plurality goes to the core of the present dispute. The plurality held that "consideration of the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304. The absence of any authority for this constitutional rule did not go unnoticed. *Id.*, at 321 (Rehnquist, J., dissenting). We are too far down the road, however, for this Court to overrule this prong of *Woodson*. What must be done instead is to insure that this rule is not expanded to such a scope that it nullifies the anti-discriminatory progress made since *Furman*.

There has been some disagreement among the Members of this Court as to whether there is "tension" between *Furman* and the progeny of the third prong of *Woodson*.[3] See *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring); *Franklin* v. *Lynaugh*, 108 S. Ct. 2320, 2331, 101 L. Ed. 2d 155, 171 (1988) (plurality); *id.*, at 2338, L. Ed. 2d, at 180 (Stevens, J., dissenting). Whether the task is characterized as accommodating the tension or avoiding the creation of tension, see *Franklin*, 108 S. Ct., at 2340, 101 L. Ed.

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3. The progeny are *Lockett* v. *Ohio*, 438 U. S. 586 (1978), *Eddings* v. *Oklahoma*, 455 U. S. 105 (1982), *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), *Sumner* v. *Shuman*, 483 U. S. 66 (1987), *Mills* v. *Maryland*, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) and *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

2d, at 182 (Stevens, J., dissenting), the task remains vitally important. The "all mitigating evidence" requirement must not be expanded to the point where the states are prohibited from guiding and channeling the sentencer's discretion.

In addition, the states should not be restricted to the bare constitutional minimum in their efforts "to promote the even-handed, rational, and consistent imposition of death sentences under law." See *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976). If a state wants to provide more guidance in an effort to seek more evenhandedness than this Court has required, the *Woodson* rule should not be expanded to the point where it stands in the way of that salutary effort.

The proper scope of the *Woodson* rule is best seen by comparing the statute in that case with the other systems approved and disapproved by this Court on the same day. The results in these five cases seem to depend on the answers to three questions. First, is the category of death-eligible defendants narrowed to the point where death is not such a rare penalty within that category as to be wanton or freakish? See *Gregg* v. *Georgia*, 428 U. S. 153, 206-207 (1976). Second, is the sentencer permitted to consider all "relevant facets of the character and record of the individual offender [and] the circumstances of the particular offense." *Woodson*, 428 U. S., at 304. Third, is the sentencer permitted sufficient discretion to avoid the problem of random jury nullification identified in *Woodson*, 428 U. S. at 303, but not so much as to result in the arbitrariness condemned in *Furman*.[4]

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4. A six-member majority of this Court summed up these rules this way in *Lowenfield* v. *Phelps*, 108 S. Ct. 546, 555, 98 L. Ed. 2d 568, 583 (1988): "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more." In light of the approving discussion of *Jurek* which preceded this statement, *id.*, at 554, L. Ed. 2d, at 582, however, the Court clearly did not mean that unlimited discretion was required.

The Georgia system of narrowing the class by finding a statutory aggravating circumstance, followed by a sentencing hearing with unlimited discretion and an appellate proportionality review, was deemed to comply. *Gregg*, 428 U. S., at 196-98. So was the Florida system, which directed a balancing of mitigating against aggravating factors. *Profitt* v. *Florida*, 428 U. S. 242, 248-53 (1972). The Texas system of narrowing the definition capital murder and basing the sentence solely upon the jury's response to three specific, fact-based questions was approved for reasons discussed further below. *Jurek*, 428 U. S., at 268-74. Mandatory systems imposing the death penalty for conviction of first degree murder, *Woodson*, *supra*, or a narrowed class of first-degree murder, *Roberts* v. *Louisiana*, 428 U. S. 325, 332 (1972), were struck down.

C. Consideration of All Mitigating Evidence.

In analyzing the "all mitigating evidence" question, it is instructive to consider the North Carolina statute struck down in *Woodson* together with the Texas statute upheld in *Jurek*. As noted above, North Carolina had made the death penalty mandatory for all first-degree murderers, while Texas had narrowed the definition of "capital murder" and, with no mention of mitigating circumstances, required a death sentence upon affirmative answers to three questions regarding deliberateness, future dangerousness, and unreasonable response to any provocation. Neither statute, on its face, allows the sentencer any discretion. "The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedure turns on whether the enumerated questions allow *consideration* of particularized mitigating factors." *Jurek*, 428 U. S., at 272 (italics added).

Conspicuous by its absence from *Jurek*'s statement of the question is any requirement that the sentencer have *unlimited* discretion to grant a life sentence once it had considered those particularized mitigating factors. The *Jurek* court upheld the statute on the basis of an assurance from the Texas Court of Criminal Appeals "that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to

show." *Ibid*. There is no trace of any similar assurance that the jury would be authorized to answer the question "no," even if it believed the correct answer to be "yes" on the basis of the evidence presented, simply because of the personal opinions of the jurors that death is not the "appropriate" sentence for the defendant. By no stretch of the imagination could the Texas system be thought to authorize such a response.

The distinction between *Woodson* and *Jurek*, then, lies *only* in the ability or inability of the jurors to consider all mitigating evidence without violating their oaths. In *Jurek* the jurors were deemed to be able to take such evidence into account in arriving at their answers to the statutory questions, while in *Woodson* they were not. The cases are identical, however, in that once the questions are answered it is the statute and not the whim of the jurors that determines the sentence. Throughout the "all mitigating evidence" cases, this Court has never waivered from *Jurek*'s holding that such a system is permissible.

The requirement of *Woodson* that *all* mitigating evidence be considered was made more explicit by the plurality opinion in *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978). The keystone of the *Lockett* holding was the requirement "for a greater degree of reliability." *Ibid*. Reliability requires that the sentencer have all of the relevant information, see *id*., at 605, but it does *not* require that the sentencer have unlimited discretion.

The *Lockett* plurality rule was raised to majority status in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), where the Court again emphasized the basis of the rule as one promoting reliability in sentencing. "[T]he rule in *Lockett* recognizes that a consistency produced by *ignoring* individual differences is a false consistency." *Id*., at 112 (italics added). Justice O'Connor sounded a similar note in her concurrence, stating that the purpose of the rule is to "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id*., at 118. The *Lockett-Eddings* rule is an application of the maxim that the equal treatment of unequals is itself an inequality. Thus understood, it is consistent with the equality principle of *Furman*

In *California* v. *Brown*, 479 U. S. 538 (1987), this Court addressed a limitation on jury discretion in the context of the *Lockett-Eddings* rule. In that case the "jury was told not to be swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling.' " *Id.*, at 542. There appears to be no disagreement that the State can legitimately instruct jurors "that conjecture, passion, prejudice, public opinion, or public feeling should [not] properly play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." *Ibid.*; see *id.*, at 549 (Brennan, J., dissenting). The crux of the disagreement between the majority and Justice Brennan's dissent is whether the jurors understood that they could consider the sympathetic *evidence*. See *id.*, at 550, 553-55 (dissent).

In the view of at least seven members of the *Brown* Court, then, it would have been perfectly proper to instruct the jury not to make a decision based on these extraneous factors provided that the jury is clearly instructed that sympathy based on the mitigating evidence is proper.[5]

The upshot of *Brown*, then, is that a State *may* impose some limits on the authority of the sentencer to opt for life instead of death, provided that it does not do so in such a way as to preclude consideration of mitigating evidence. Such limits are perfectly consistent with the underlying purpose of *Woodson-Lockett-Eddings* to further the evenhandedness and reliability of capital sentencing. *Brown*, 479 U. S., at 543. Such limits are perfectly consistent with the requirement that "the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant's background, character,

5. We say "at least seven" because Justice Blackmun's opinion, joined by Justice Marshall, might seem on its face to imply that sentencer's discretion need be neither rational nor moral. *Id.*, at 561. From his other opinions, though, it appears that he does not really mean that a life sentence based on racial prejudice against the victim would be proper. See *McCleskey* v. *Kemp*, 481 U. S. 279, 346-47 (Blackmun, J., dissenting).

and crime rather than mere sympathy or emotion." *Id.*, at 545 (O'Connor, J., concurring) (italics in original).[6]

D. Franklin and Penry.

The distinction between consideration of all mitigating evidence and unlimited discretion to grant a life sentence has finally been brought into sharp focus by a pair of Texas cases in the last two terms: *Franklin* v. *Lynaugh*, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) and *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

The Texas statute in these two cases limits the sentencer's discretion to grant a life sentence to a far greater degree than the California statute in the present case. Yet the outcome in both cases turned solely on whether the promise relied on in *Jurek* had been kept. "*Jurek* [rested] fundamentally on the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced that was relevant to the defendant's background, character, and to the circumstances of the offense." *Penry*, 109 S. Ct., at 2948, L. Ed. 2d, at 279-80.

In *Franklin* the defendant made an argument strikingly similar to the defense argument in this case. He contended that the jury had to be instructed "that any evidence considered by them to mitigate against the death penalty should be taken into account in answering the special issues, and could *alone* be enough to return a negative answer to either one or both of the questions submitted to them — even if the jury otherwise believed that 'yes' answers to the Special Issues were warranted." *Franklin*, 108 S. Ct., at 2325, 101 L. Ed. 2d, at 163.

The plurality emphatically rejected this argument. *Id.*, at 2330-32, L. Ed. 2d, at 169-71. Indeed, the plurality's language is so strong that

6. Counsel for defendant prefers to omit the "rather" clause when quoting this passage. See Petitioner's Brief at 33, 43.

if this Court adheres to that view then the present question is a foregone conclusion. We will therefore limit this discussion to the *Franklin* concurrence and the *Penry* majority opinion.

The keystone of both of these opinions is "the principle underlying *Lockett*, *Eddings* and *Hitchcock* . . . that punishment should be directly related to the personal culpability of the defendant." *Franklin*, 108 S. Ct., at 2332, 101 L. Ed. 2d, at 172; *Penry*, 109 S. Ct., at 2947; 106 L. Ed. 2d, at 278. Not whim, not caprice, not prejudice, not "untethered sympathy," see *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring), not the random chance of getting a "soft" jury, just the personal culpability of the defendant.

Penry differed from *Franklin* only in that the "express assurance" upon which *Jurek* had been based was not kept. While Franklin's only mitigating evidence (good conduct in prison) was considered under the question of future dangerousness, 108 S. Ct., at 2333, 101 L. Ed. 2d, at 173 (concurrence), Penry's evidence of mental retardation had compelling mitigating force which was not considered under any of the three questions. 109 S. Ct., at 2950, 106 L. Ed. 2d , at 283. Given that the jury in the present case understood its determination of mitigating factors to include consideration of *all* of defendant's evidence,[7] the *Penry* problem is absent. Defendant's argument is therefore reduced to the one which was explicitly rejected by the *Franklin* plurality and necessarily, though not as explicitly, rejected by the concurrence as well.

Like all Texas juries, Franklin's was asked whether there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society. It is quite possible that a juror with a high personal threshold for when a death sentence is appropriate would answer that question "yes" but still not believe that the probability was high *enough* that he personally believed that death was warranted. Cf. Petitioner's Brief 32-33. Franklin asked for

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7. See p. 2, *supra*.

instructions addressed to such a juror, 108 S. Ct., at 2325, n. 4, 101 L. Ed. 2d, at 163, and this Court upheld the refusal of those instructions.

The *Franklin* concurrence disagreed with the plurality only to the extent that it "suggest[ed] that a State may constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence," 108 S. Ct., at 2332, 101 L. Ed. 2d, at 172, a disagreement which formed the basis of *Penry*. The basic rule of *Franklin* and *Jurek* therefore survives *Penry*. A state may constitutionally base a death sentence upon the jury's response to a specific question so long as that question permits consideration of all mitigating evidence. That question is *not* required to include the jurors' *personal* opinion of appropriateness. The state may base *its* policy of appropriateness on the answer to the question.

In each of the cases reversing a death sentence under *Woodson*, the reason has been preclusion of the introduction or consideration of mitigating evidence. See note 3, *supra*. This Court has never reversed a sentence because of channeling of the sentencer's discretion under a procedure which permitted full consideration of all the evidence proffered by the defendant, while *Jurek* and *Franklin* upheld more extensive limitations than the one presented in this case. If the Texas procedure of asking only about deliberateness and future dangerousness[8] passes muster, then surely the far broader question of whether aggravating circumstances outweigh the mitigating does also. In an area of the law which cries out for stability, see *Lockett* v. *Ohio*, 438 U. S. 586, 602 (1978) (plurality), the choice is between following precedent or overruling it. We will demonstrate in the following parts that following *Jurek* is good policy as well as good law.

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8. The third question, response to provocation, appears to be rarely presented in capital cases.

II. The threshold determination that the aggravating factors suffice if they are not outweighed may be made by statute.

Defendant argues that the California system precludes the jury from determining that the aggravating circumstances are insufficient to warrant a death sentence even if there are no mitigating factors at all, quoting Justice Stevens's concurrence in *Barclay* v. *Florida*, 463 U. S. 939, 964 (1983). Petitioner's Brief at 32. The quote is taken out of context; Justice Stevens was merely describing a feature of the Florida system, not holding that this feature was constitutionally mandated.[9] Nevertheless, Justice Stevens's analysis of the Florida system helps put the present question in perspective and is worth reviewing in detail.

According to this analysis, the path to a capital sentence in Florida goes through three stages. First, at least one statutory aggravating circumstance is found. *Id.*, at 962. Second, the *statutory* mitigating circumstances are found to be insufficient to outweigh the aggravating circumstances. *Id.*, at 963. Then,

> "since more information has already been taken into account in crossing the threshold [than in Georgia] the third-stage determination is more circumscribed—whether, even though the first two criteria have been met, it is nevertheless not appropriate to impose the death penalty. Cases reaching this conclusion tend to fall into either or both of two general categories: (1) those in which statutory aggravating circumstances exist, and arguably outweigh statutory mitigating circumstances, but they are insufficiently weighty to support the ultimate sentence; and (2) those in which, even though *statutory* mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." *Id.*, at 964 (footnotes ommitted).

9. He indicated that this feature "helps to fulfill one of the constitutionally required functions of a death penalty scheme." *Id.*, at 964, n. 7. That is far different from holding that it is required.

Stated another way, the system described above could be considered as asking four questions: (1) Is there a statutory aggravating circumstance? (2) Do statutory aggravating circumstances outweigh the statutory mitigating circumstances? (3) Are the statutory aggravating circumstances sufficiently weighty to support the ultimate sentence? (4) Do the total aggravating circumstances outweigh the total (statutory and nonstatutory) mitigating circumstances? A death sentence may properly be rendered upon affirmative answers to all four questions. The fact that "the third stage determination is more circumscribed," than the absolute discretion in Georgia does not render the procedure constitutionally infirm.

A state wishing to base its capital sentencing on the same criteria is not required to follow the same order. If the state does not distinguish between statutory and nonstatutory mitigating circumstances and does not allow nonstatutory aggravating circumstances, then the second and fourth questions are identical and can be combined. Similarly, the first and third questions can be combined by identifying in advance a subset of aggravating circumstances which society deems "sufficiently weighty" and restricting the threshold inquiry to only those circumstances.

Restructured in this way, the sentencing questions would be: (1) Is there at least one aggravating circumstance which is sufficiently weighty that society deems it to justify a death sentence if not outweighed by mitigating circumstances? (2) Considering (a) *all* the evidence that defendant proffers as mitigating, (b) the aggravating circumstance(s) previously identified, and (c) the other "make weight" aggravating circumstances not included in the first list, do the total aggravating circumstances outweigh the total mitigating circumstances? These are the questions presented to the jury as the dissent below understood them. See *People* v. *Boyde*, 46 Cal. 3d 212, 259, 758 P. 2d 25 (1988) (Arguelles, J.). Even *if* the dissent is correct,[10]

10. We do not concede the question of whether the majority's or dissent's interpretation was correct. That point has been fully briefed by the Attorney General.

there is no federal error. The system described above is constitutional.

Unlike most states, California has *two* sets of aggravating circumstances. The first list is called the "special circumstances" and for the actual killer they are the ones enumerated in California Penal Code section 190.2, subdivisions (a)(1) through (a)(19).[11] This list is not actually as long as it seems, because many of the circumstances are variations on others. Boiled down to its essence, the list consists of (1) murder of public officials in the course of their duties;[12] (2) murder to escape prosecution or punishment for an earlier crime;[13] (3) committing murder more than once;[14] (4) murder by particularly heinous means;[15](5) murder for particularly heinous motives;[16] and (6) murder in the course of a violent or dangerous felony.[17]

Once the threshold for death-eligibility has been crossed, the factors weighing on the side of a death sentence are taken from Penal Code section 190.3. Added to the "special" circumstances are any other circumstances of the crime, *id.*, subd. (a), prior violent or forcible criminal activity, *id.*, subd. (b), and any prior felony conviction, *id.*, subd. (c). While the list of added circumstances is shorter, it consists of items which are far more common. Capital trials of defendants

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11. Accomplice liability is generally governed by subdivision (b), requiring a specific intent to kill. See *People* v. *Anderson*, 43 Cal. 3d 1104, 1142, 742 P. 2d 1306 (1987)

12. Paragraphs 7, 8, 9, 11, 12 and 13.

13. Paragraphs 5 (escape) and 10 (killing a witness).

14. Paragraphs 2 (prior conviction) and 3 (multiple murder).

15. Paragraphs 4 and 6 (explosives), 15 (lying in wait), 19 (poison), and 14 and 18 (torture). For the equivalence of 14 and 18, see *People* v. *Superior Court* (*Engert*), 31 Cal. 3d 797, 802, n. 2, 647 P. 2d 76 (1982).

16. Paragraphs 16 ("hate crimes") and 1 (financial gain).

17. Paragraph 17.

without prior records of felonious, violent or forcible crime are now the exception rather than the rule. Two-thirds of death-sentenced inmates now have prior felony convictions. U. S. Bureau of Justice Statistics, *Capital Punishment 1987*, 1.

The separation of the "special circumstances" from the others identifies those circumstances which are sufficiently weighty to justify a death sentence in the absence of any mitigating circumstances. For example, the separation distinguishes the especially compelling aggravating circumstance of prior conviction of *murder*, Cal. Penal Code § 190.2 (a) (2), from the "make weight" circumstance of prior conviction of *any* felony, *id.*, § 190.3 (c). The only difference between this model and the one described by Justice Stevens is that the separation is made by statute rather than by the sentencer. Nothing in this Court's precedents forbids such a structuring of the system.

Sumner v. *Shuman*, 483 U. S. 66 (1987), provides an informative contrast. Shuman was sentenced under a mandatory sentencing statute which provided, in effect, that a given aggravating circumstance (murder by a life prisoner) was given "a weight that is deemed to *outweigh any* possible combination of mitigating circumstances." *Id.*, at 81 (italics added).[18]

The statute was held unconstitutional under *Lockett* because it precluded the sentencer's consideration of mitigating circumstances. Most importantly, the statute precluded consideration of minor accomplice status. *Ibid.* The Court noted that the mitigating factors in Nevada's present statute, which are virtually a carbon copy of California's mitigating factors, could be applicable. *Id.*, at 82.

In contrast, the system involved here *never* requires a sentencer to give any aggravating factor a weight that necessarily outweighs any

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18. Significantly, the *Shuman* court uses this "outweigh" language interchangeably with the "appropriate sentence" language.

mitigating factor. The assignment of weights is always within the sentencer's discretion. *People* v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440 (1985), reversed on other grounds sub. nom. *California* v. *Brown*, *supra*. The *Woodson-Lockett-Eddings* problem is absent. Defendant is *not* treated as a member "of a faceless, undifferentiated mass." Cf. *Woodson*, *supra*, 428 U. S., at 304. He can present *all* his mitigating evidence, cf. *Lockett*, *supra*, 438 U. S., at 604, and the sentencer is *required* to listen, cf. *Eddings* v. *Oklahoma*, 455 U. S. 104, 115, n. 10 (1982).

Defendant's "absolute weight" argument has no support in any of this Court's holdings. California has done exactly what Justice Brennan insisted that it do in *McGautha*. It has expressed its penological policy on capital punishment. See *McGautha* v. *California*, 402 U. S. 183, 285-86 (Brennan, J., dissenting). Defendant simply disagrees with the policy.

III. Individualized sentencing should be based on the defendant, not the jurors.

Defendant's final argument stands *Furman* v. *Georgia* on its head. He claims to be constitutionally entitled to the unguided discretion of the jury to impose a sentence based on nothing more than their personal opinions. See Petitioner's Brief at 42 (criticism of prosecutor's argument that "this is not a personal decision.") .While the Constitution may permit such unlimited discretion in a state sentencing system, it has never yet been held to require it.

This Court has said many times that sentencing should be individualized. See, *e.g.*, *Sumner* v. *Shuman*, 483 U. S. 66, 75 (1987). The "individual" referred to is the defendant, not the juror. The whole point of this massive, complex body of law is that "punishment should be directly related to the personal culpability of the criminal defendant." *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2947, 106 L. Ed. 2d 256, 278 (1989). If two defendants are guilty of the same crime under the same circumstances and with the same aggravating and mitigating factors, then they should receive the same-punishment. If one receives a life sentence because his jurors had a different personal threshold than the jurors in the other case, the direct relation of punishment to culpability has not been achieved.

Perfect proportionality is, of course, unachievable. As with any discretionary evaluation system, the cases will inevitably sort themselves out into a low range where the death penalty is rarely applied, a high range where it is consistently applied, and a midrange where the elements of jury variation, prejudice and other improper factors may make the difference. See *McCleskey* v. *Kemp*, 481 U. S. 279, 287, n. 5 (1987).[19]

The unachievability of the ideal is no reason not to do the best we can, however. Capital punishment remains, for the time being, an undeniable political reality.[20] If this Court is unwilling to *require* the States to channel the sentencer's discretion after the preliminary aggravating circumstance finding has been made, *Zant* v. *Stephens*, 462 U. S. 862, 912 (1983) (Marshall, J., dissenting), the least it can do is not *prevent* them from doing so.

Defendant's argument is precisely the opposite of the defense argument which was accepted by two Justices of this Court in *Zant* v. *Stephens*. In response to a certified question, the Georgia Supreme Court explained that the large category of persons guilty of homicide was analogous to a pyramid divided by three planes. The first plane separates murder from lesser homicides. The second plane was the statutory aggravating circumstances which separate death-eligible murderers from others. *Id.*, at 870-71.

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19. Prejudice and *McCleskey* are discussed further in part IV, below.

20. The California Supreme Court's attempt at judicial abolition was swiftly overruled by the people. Cal. Const. art. I, § 27; see *Gregg* v. *Georgia*, 428 U. S. 153, 181 (1976). Popular support is far more than sufficient to do the same on the federal level, if need be. See U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Statistics — 1987*, 165 (85% support death penalty for some or all murderers).

> "The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. *There is an absolute discretion in the factfinder to place any given case below the plane and not impose death.*" *Id.*, at 871 (italics added).

Justice Marshall, joined by Justice Brennan, found this system constitutionally deficient. "If this is not a scheme based on 'standardless jury discretion' [citation], I do not know what is. Today's decision makes an absolute mockery of this Court's precedents concerning capital sentencing procedures." *Id.*, at 910 (dissent). The drafters of California's statute anticipated the *Zant* v. *Stephens* argument and included the "balancing" language specifically to ward off that attack. See *People* v. *Boyd*, 38 Cal. 3d 762, 773, n. 5, 700 P. 2d 782 (1985).

While *Zant* held that the Georgia system of absolute discretion in the final stage did not fall below the constitutional minimum, it surely does not follow that this "mockery" is constitutionally *required*. California stands accused by the defense of the "crime" of doing *more* than is constitutionally required to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.' " *Zant*, 462 U. S., at 909 (dissent) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980)).

It might be argued that limiting discretion to *impose* the death sentence meets the need while still allowing unlimited discretion to spare the defendant. However alluring this argument may be to those who oppose capital punishment generally, that "solution" is a mirage. For a channel to be a channel it must have *two* banks. A dike does not suffice.

Minimizing the number of death sentences is not and never has been the goal. See *McGautha*, 402 U. S., at 305-306 (Brennan, J., dissenting). The goal is "evenhanded, rational, and consistent imposition of death sentences *under law*." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (italics added). The goal is to directly relate punishment to culpability. *Penry*, 109 S. Ct., at 2947, 106 L. Ed. 2d, at 278.

To come as close as possible to achieving these goals, we must establish a state policy as to what kind of cases warrant capital punishment and instruct the jurors to carry out that policy. See *McGautha*, 402 U. S. at 305 (Brennan, J., dissenting). The fact that the determination cannot be made mechanical is no reason not to state a policy. *Id.*, at 285-86. The fact that discretion is inevitably required is no reason not to channel it. *Id.*, at 285.

If the people of California establish as their policy that death is the appropriate sentence for all cases in which at least one "special" circumstance is present and in which the aggravating factors outweigh the mitigating, nothing in this Court's jurisprudence requires that the jury be instructed to disregard that policy and follow the personal whims of its members.

IV. Unlimited discretion to grant a life sentence may aggravate the *McCleskey* problem.

Any complete discussion of capital punishment must take into consideration the problem of racial discrimination. There can be little doubt that *Furman* v. *Georgia*, 408 U. S. 238 (1972) would have been decided differently but for the influence of racism. See *id.*, at 257 (Douglas, J.). Whatever else this Court may do, its first and highest priority should be to avoid making any rule that would even *potentially* increase the impact of race on sentencing.

In *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), this Court was confronted with an empirical study of capital sentencing in Georgia which claimed to show that persons who killed white victims were more likely to receive the death penalty than persons who killed black victims under similar circumstances, particularly in the mid-range of cases. *Id.*, at 287, n. 5. A narrowly and bitterly divided Court held that these statistics did not establish an equal protection violation. As with *Zant* v. *Stephens*, *supra*, however, the fact that the Georgia system is not unconstitutional does not mean that we cannot or should not improve upon it.

Justice Brennan's dissent makes several important points. He notes the importance of lists of aggravating and mitigating factors. *McCleskey*, 481 U. S., at 333. More importantly, he notes the importance of a "standard for balancing them against one another," *ibid.*, precisely the feature of the California statute which defendant attacks. He notes the burden on the State to devise a better system. *Id.*, at 334, n. 9. Clearly, the State can do nothing in this direction if its hands are tied by constitutional rules.

Perhaps most poignantly, Justice Brennan observes that "diminished willingness to render [a death] sentence when blacks are victims reflects a devaluation of the lives of black persons." *Id.*, at 336. Indeed it does, and that is why it is so important to channel discretion and hold that diminished willingness in check. For the essence of the *McCleskey* problem is not that McCleskey did not deserve his sentence but that others equally deserving were spared on an impermissible basis. If the rule that defendant seeks to make in this case would hamper the efforts of states to address this problem, then that rule should not be made.

Amicus California Appellate Project (CAP) has presented the Court with some data from Alameda County.[21] CAP Brief 27-29. For reasons that are fully explained in the brief of the Attorney General, CAP's claim that definitive conclusions can be drawn from these data is vastly overstated. Obviously this study is nowhere near the sophistication of the Baldus study. Nonetheless, at our request the District Attorney of Alameda County determined the race and ethnic group of the defendants and victims in these cases. These data tentatively support Justice Brennan's hypothesis that the lack of a standard for balancing aggravating against mitigating contributes to the *McCleskey* problem. See *McCleskey*, 481 U. S., at 333 (dissent).

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21. CAP's brief gives the impression, perhaps inadvertently that the verdict forms described there were the product of a cooperative effort of the bench and bar. Actually, these forms were used over the vehement objection of the District Attorney.

Table 1
Ethnicity of Defendants and Homicide Victims

	Defendant	Victim
Death Verdicts:		
Day	Black	Black*
Freeman	White	White
Hill	Black	Black*
Mason	White	White*
Mitcham	Black	White
Thomas	Black	White*
Wash	White	White
LWOP Verdicts:		
Barbosa	Black	White
Calderon	Hispanic	Hispanic
Delgado	Hispanic	Hispanic
Green	Black	White
Jones	Black	Black
Quinnell	White	White
Smith	White	White
Weston	Black	Black

* Multiple homicide victims, all of the same ethnic group. Two cases also involved a surviving victim; Ethnicity shown is that of the deceased.

Table 1 shows the race or ethnic group of the defendant and the homicide victim(s) in the fifteen cases designated by CAP as those where the jury found the aggravating outweighed the mitigating. See CAP Brief, Appendices D and E. Cases with multiple victims are indicated. Table 2 then shows the percentages. Considering all cases, there are slightly fewer death sentences in both minority cases and minority-defendant cases. However, Table 1 shows that death

verdicts were returned in all four of the multiple-murder cases, indicating that juries consider this circumstance powerfully aggravating. Excluding these cases,[22] the percentage of death verdicts in minority-victim cases drops to *zero*, while the percentage of death verdicts in nonminority-victim cases remains near one-half.

Table 2
Percent of Death Sentences

All Cases:			
Minority defendant	40.0%	Minority victim	33.0%
Nonminority defendant	60.0%	Nonminority victim	55.6%
Single-Homicide Cases:			
Minority defendant	14.3%	Minority victim	0.0%
Nonminority defendant	50.0%	Nonminority victim	42.9%

CAP maintains that instructions such as those in Boyde's case would have resulted in eight additional death verdicts. CAP Brief at 28-29. We do not believe that case is proven, but even assuming that result for the sake of argument, an increased number of death sentences is not necessarily an undesirable result. If reduced willingness to render a death sentence in minority-victim cases devalues the lives of minority people, as it most assuredly does,[23] the answer is not to equally devalue the lives of the white victims. The answer is to structure the system and channel discretion so as to achieve justice for the minority victims as well.

22. The Baldus study found that racial problems were more acute when particularly heinous crimes were excluded from the sample. *McCleskey*, 481 U. S., at 287, n. 5.

23. See p. 23, *supra*.

We will not pretend that this limited sample proves our hypothesis. It does, however, indicate a significant *possibility* that an instruction in the bare words of the statute produces less discriminatory results than the instruction now being used. If the states are to devise better, less discriminatory systems, they must not be strapped into the constitutional straitjacket which the defendant proposes.

Conclusion

The judgment of the Supreme Court of California should be affirmed.

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Respectfully submitted,

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